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No. 77-1374

In the Supreme Court of the United States

OCTOBER TERM, 1977

C. K. SMITH & CO., INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 569 F.2d 162. The Board's decision and order (Pet. App. 14a-77a) are reported at 227 N.L.R.B. 1061.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1977. The petition for a writ of

certiorari was filed on March 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether employees who strike in support of fellow employees who are striking to protest unfair labor practices by their common employer are entitled to the same reinstatement rights as the primary unfair labor practice strikers.

2. Whether the Board properly found that the union did not contractually waive the employees' statutory right to participate in an unfair labor practice sympathy strike.

STATEMENT

1. Petitioner C. K. Smith Co., Inc., is a retail seller and distributor of oil and related products. Petitioner Buckley Heating Co., Inc., sells and distributes the same products at wholesale. (Pet. App. 30a.) The two companies share the same premises and management, and the National Labor Relations Board found them to be a single employer for the purposes of the Act (Pet. App. 28a-29a). The court of appeals upheld that finding (Pet. App. 3a-4a) and petitioners do not challenge it here.

Petitioners' retail and wholesale drivers were represented, in separate units, by Teamsters Local 170. In March 1974, the union began an organizing campaign among the mechanics at the Smith company (Pet. App. 30a). The Board found that the company violated Section 8(a)(1) of the Act when, during the course of the mechanics' organizing campaign, it engaged in coercive interrogation, promised benefits if the union were defeated, and threatened an employee with loss of work if the union were successful (Pet. App. 42a-43a). The Board further found that the company violated Sections 8(a)(1) and 8(a)(5) of the Act by withdrawing the recognition that it had previously accorded the union in the mechanics' unit (Pet. App. 54a), and by bargaining individually with retail driver unit employees while contract negotiations for that unit were in progress (Pet. App. 37a-38a). Petitioners did not dispute those findings in the court of appeals (Pet. App. 4a).

After the company withdrew recognition from the union, the six mechanic employees voted to strike (Pet. App. 58a). The strike, which began on April 29, 1974, was joined by both the retail and wholesale drivers (Pet. App. 33a, 56a). The Administrative Law Judge, whose decision was adopted by the Board, concluded that the strike was an unfair labor practice strike, caused by the company's various violations of the unfair labor practice provisions of the National Labor Relations Act, 61 Stat. 140, 29 U.S.C. 158(a) (Pet. App. 65a) In addition, the Administrative Law Judge found that the retail and wholesale drivers who joined the strike did so "primarily in sympathy with the strike of the mechanic employees" (*ibid.*). The court of appeals upheld these findings (Pet. App. 5a).

2. On July 8, 1974, the strikers made an unconditional offer to return to work. Petitioners refused to

reinstate the mechanics, the wholesale drivers, and one of the retail drivers, although certain wholesale drivers were reinstated later (Pet. App. 66a-67a). After complaints were filed and a hearing held, the Board found that petitioners had violated Sections 8(a)(1) and 8(a)(3) of the Act by refusing to reinstate both the mechanics and the drivers who had been on strike.

The Board held, first, that the drivers, as employees of the same enterprise, acquired the status of unfair labor practice strikers when they struck in sympathy with the mechanics, who were clearly unfair labor practice strikers (Pet. App. 65a). Second, the Board held that the wholesale drivers had not violated their contractual obligation not to strike because the terms of the drivers' contract did not "reveal a waiver of the right to strike over unfair labor practices or to strike in sympathy with other employees" (Pet. App. 62a-63a).

The court of appeals upheld the Board on both of these issues. The court observed that a sympathy striker resisting unfair labor practices may have more at stake than a similarly situated economic striker. An employer's effort to oust the union from one unit, the court noted, "could have deleterious effects on the union's prestige and the stability of collective bargaining throughout the plant" (Pet. App. 8a). Since sympathy strikers stand in the shoes of primary strikers for purposes of lawful discipline and replacement, the court concluded, "it seems equitable to

afford them preferential reinstatement rights where such rights are granted primary strikers" (*ibid.*).

With respect to the no-strike clause in the drivers' contract, the court held that the Board's interpretation of the clause was supportable in light of the principle that a no-strike provision is ordinarily coterminous with the duty to arbitrate. Since the dispute between the mechanics and the employer could not be the subject of a grievance under the wholesale drivers' contract, there was no duty to arbitrate, and the no-strike clause did not bar the drivers from engaging in a sympathy strike (Pet. App. 11a). Accordingly, the court of appeals upheld the Board's conclusion that petitioners had improperly refused to reinstate the drivers when they made an unconditional offer to return to work.

ARGUMENT

1. It is well settled that employees who strike in response to an employer's unfair labor practices are entitled to full reinstatement upon an unconditional offer to return to work, even if permanent replacements have been hired. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278. Similarly, employees who join a picket line established by fellow employees at their common employer's premises are entitled to the same protection as strikers under the Act. *Gary Hobart Water Corp.* v. *National Labor Relations Board*, 511 F.2d 284, 287 (C.A. 7), certiorari denied, 423 U.S. 925; *Kellogg Company* v.

National Labor Relations Board, 457 F.2d 519, 523 (C.A. 6), certiorari denied, 409 U.S. 850; *National Labor Relations Board* v. *Union Carbide Corporation*, 440 F.2d 54, 55-56 (C.A. 4), certiorari denied, 404 U.S. 826; *National Labor Relations Board* v. *Southern Greyhound Lines, Inc.*, 426 F.2d 1299, 1301 (C.A. 5). From these principles it follows that where the primary striker and the sympathy striker have a common employer, the sympathy striker has the same reinstatement rights as the primary striker. *Newspaper Production Co.* v. *National Labor Relations Board*, 503 F.2d 821, 830 (C.A. 5); *General Tire & Rubber Co.* v. *National Labor Relations Board*, 451 F.2d 257 (C.A. 1); *Pilot Freight Carriers, Inc.*, 224 N.L.R.B. 341, 342.

Petitioners argue that these principles should not apply to sympathy strikers who support fellow employees in an unfair labor practice strike against a common employer. The court below rejected that argument, and, contrary to petitioners' contention, there is no conflict among the circuits on this issue.

Petitioners urge that the decision below conflicts with that of the Fourth Circuit in *National Labor Relations Board* v. *Union Carbide Corp.*, 440 F.2d 54. In that case, however, the court held that an employee who declined to cross a picket line out of fear rather than principle was not engaged in concerted activity protected by Section 7 of the Act. In this case, by contrast, the Administrative Law Judge found that the reason the wholesale drivers struck was "pri-

marily in sympathy with the strike of the mechanic employees" (Pet. App. 65a). Petitioners did not except to that finding before the Board, nor did they contend that the finding was inadequate to establish that the wholesale drivers were animated by principle rather than fear. Petitioners are therefore precluded from raising that contention here. 29 U.S.C. 160(e); *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253; *National Labor Relations Board* v. *Seven-up Co.*, 344 U.S. 344.

The other court of appeals decisions relied on by petitioners are distinguishable from this case in that in each instance the sympathy strikers worked for a different employer than the primary strikers. *National Labor Relations Board* v. *L. G. Everist, Inc.*, 334 F.2d 312 (C.A. 8); *Teamsters, Chauffeurs & Helpers Local U. No. 79* v. *National Labor Relations Board*, 325 F.2d 1011 (C.A.D.C.), certiorari denied, 377 U.S. 905; *National Labor Relations Board* v. *Brown & Root, Inc.*, 203 F.2d 139 (C.A. 8).[1] Nor does *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, reversing 448 F.2d 905 (C.A. 9), in any way support petitioners' position here. In that case, the Court held that since the employer had committed an unfair labor practice when it dis-

[1] Petitioners' reliance on the Board's order in the *Brown & Root* case, 99 N.L.R.B. 1031, 1037, is misplaced. The Board found that those sympathy strikers were represented by a different union, which did not authorize their wildcat strike in support of their fellow employees. And it concluded that they were not affected by the company's unfair labor practice against the other union.

charged certain economic strikers prior to the time they were replaced, the strikers were entitled to re- [redacted] on that ground alone. The Court found it unnecessary to consider whether, as a theoretical matter, the economic strikers were converted into unfair labor practice strikers at the time the employer committed the unfair labor practice of discharging them. 409 U.S. at 52-53. In any event, those strikers were not sympathy strikers. Therefore, contrary to petitioners' assertion (Pet. 16), the question the Court found it unnecessary to resolve has nothing to do with the question presented in this case.

As the court of appeals concluded (Pet. App. 6a), it is the Board's duty to balance the interests of striking employees in the exercise of their Section 7 rights against the employer's legitimate business reasons for replacing them. The Board has concluded that the proper balance between business justification and employee concerted activity requires that sympathy strikers who support an unfair labor practice strike involving a common employer be treated in the same manner as the primary unfair labor practice strikers. That resolution is consistent with the general treatment under the Act of sympathy strikers and of common employer situations, and petitioners have presented no persuasive reasons for applying a different rule in this case.

2. Petitioners further contend (Pet. 25-32) that the Board erred in holding that the no-strike provision of the collective-bargaining agreement did not bar the wholesale drivers from engaging in a sympathy

strike. This issue, turning largely upon the particular facts, does not warrant review by this Court. In any event, the Board's resolution of the matter was correct and was properly upheld by the court of appeals.

The wholesale drivers' contract contained a general no-strike clause. Since the dispute underlying the primary strike could not be processed through the wholesale drivers' grievance machinery, and since that machinery did not permit the company to obtain an arbitral determination of its claim that the wholesale drivers' sympathy strike violated the no-strike clause, the court below properly sustained the Board's finding that the no-strike clause did not bar sympathy strikes.[2] Moreover, even if the no-strike provision were considered to be ambiguous, as petitioner contends (Pet. 25-28), the Board and the court of appeals (Pet. App. 10a-11a n. 2, 63a) found that the bargaining history did not suport petitioners' assertion that the parties intended the no-strike provision to apply to sympathy strikers at the employer's premises.

National Labor Relations Board v. *Rockaway News Supply Co., Inc.*, 345 U.S. 71, on which petitioners rely, does not support their claim. That case involved employees' refusal to cross a picket line at another employer's premises; the Court found persuasive evi-

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[2] In *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397, by contrast, the final step of the grievance procedure provided that a grievance "may be submitted to arbitration upon written notice of the Union or the Company" (*id.* at 400 n. 2).

dence that the parties intended the contractual no-strike clause to apply to such situations. Here, by contrast, the Board and the court of appeals found that the parties did not intend to proscribe sympathy strikes against the common employer.

Finally, petitioners contend that the principles of *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, requires reversal here. In *Mastro Plastics* the Court held that even if employees ostensibly violated the terms of the collective-bargaining agreement by engaging in an unfair labor practice strike, the agreement would not readily be construed as a waiver of the employees' right to strike over unfair labor practices that undermined the collective-bargaining relationship. *Id.* at 283. Petitioners argue that the unfair labor practices in this case were not sufficiently flagrant to warrant application of the *Mastro Plastics* doctrine.[8]

Since the Board found that the collective-bargaining agreement did not bar the strike in question here, it was not necessary for the Board to rely on *Mastro Plastics* to uphold the strikers' actions. In any event, as the court of appeals held (Pet. App. 10a), *Mastro*

[8] Petitioners also reiterate their contention that there was no causal connection between the unfair labor practices and the drivers' strike, and that therefore the strikers should not have been reinstated. See *Winter Garden Citrus Products Coop.* v. *National Labor Relations Board*, 238 F.2d 128 (C.A. 5). But, as we have noted, the Administrative Law Judge found that the wholesale drivers struck in sympathy with the mechanics, who were engaged in an unfair labor practice strike, and petitioners did not challenge that finding before the Board.

Plastics provides further support for the Board's conclusion that the collective-bargaining agreement should not be read as a contractual waiver of the drivers' right to engage in a sympathy unfair labor practice strike in support of fellow employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Associate General Counsel,
National Labor Relations Board.

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